Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPLICATION NO 08–2 OF 2001–(W)
MOHAMED DZAIDDIN CHIEF JUSTICE
23 FEBRUARY 2001

Civil Procedure *— Appeal — Leave to appeal — Application for leave to appeal to Federal Court — Criteria for granting leave — Whether applicant raised a question of general principle not previously decided by the Federal Court — Whether applicant would have a prima facie case for success should leave to appeal be granted*

This action involved an application for leave to appeal from the decision of the Court of Appeal under s 96(a) of the Courts of Judicature Act 1964. Counsel for the applicant requested leave to be granted on two questions formulated for consideration, namely, whether the Court of Appeal was correct in holding that the convictions of Sukma Darmawan and Dr Munawar Anees by the sessions court and the admission of the facts read out in court by both of them could constitute a defence of justification in respect of the offending words, meriting dismissal of the applicant's suit; and whether the Court of Appeal was right in relying on the principle in *Lange v Atkinson* [1988] 3 NZLR 424 and concluding that the decision of the trial judge on issues of qualified privilege should not be disturbed.

Held, dismissing the application with costs:

(1) In *Datuk Syed Kechik bin Syed Mohamed v The Board of Trustees of the Sabah Foundation* [1999] 1 MLJ 257 at p 265, the court held that the Federal Court grants leave to appeal from the Court of Appeal sparingly and will not grant such leave unless the following criteria are satisfied by the intending appellant: (i) the judgment of the Court of Appeal has raised a point of general principle which the Federal Court has not previously decided or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage; and (ii) if the point is decided in favour of the intending appellant, there is a prima facie case for success in the appeal (see p 68D–F).

(2) The court was of the view that the question of law as distilled from the above questions for the consideration of the court was whether, in a defamation action, the High Court can decide on the defence of justification and qualified privilege without a trial to dismiss the applicant/plaintiff's suit against the defendant/respondent under O 18 r 19 of the Rules of the High Court 1980. This question raised a question of general principle not previously decided by the Federal Court (see p 68B–C).

(3) However, the two criteria in *Datuk Syed Kechik* is not exclusive. In the circumstances of the case, the paramount consideration was whether the applicant would have a prima facie case for success should leave be granted on the question formulated above. Having agreed with the reasons and the conclusion of the learned trial judge on the defence of justification and qualified privilege after applying the law to the factual matrix of the case, it was the provisional view of the court that should leave to appeal be granted, the applicant would not have any prospect of success (see p 69B–C).

[Bahasa Malaysia summary

Tindakan ini melibatkan satu permohonan untuk kebenaran membuat rayuan terhadap keputusan Mahkamah Rayuan di bawah s 96(a) Akta Kehakiman Mahkamah 1964. Peguam bagi pihak pemohon telah memohon kebenaran diberikan berhubung dua persoalan yang dirumuskan untuk dipertimbangkan, terutamanya, sama ada Mahkamah Rayuan betul dalam memutuskan bahawa sabitan-sabitan terhadap Sukma Darmawan dan Dr Munawar Anees oleh mahkamah sesyen dan pengakuan fakta yang telah dibaca dalam mahkamah oleh mereka berdua boleh membentuk satu pembelaan justifikasi berhubung perkataan-perkataan yang menyinggung, yang memeritkan penolakan guaman pemohon; dan sama ada Mahkamah Rayuan betul apabila bergantung atas prinsip dalam *Lange v Atkinson* [1988] 3 NZLR 424 dan membuat kesimpulan bahawa keputusan hakim perbicaraan tentang isu-isu perlindungan bersyarat tidak patut diganggu.

Diputuskan, menolak permohonan tersebut dengan kos:

(1) Dalam *Datuk Syed Kechik bin Syed Mohamed v The Board of Trustees of the Sabah Foundation* [1999] 1 MLJ 257 di ms 265, mahkamah memutuskan bahawa Mahkamah Persekutuan memberikan kebenaran untuk merayu daripada Mahkamah Rayuan dengan berhati-hati dan tidak akan memberikan kebenaran sedemikian kecuali kriteria berikut dipenuhi oleh perayu yang mempunyai tujuan tersebut: (i) penghakiman Mahkamah Rayuan telah menimbulkan satu perkara prinsip am di mana Mahkamah Persekutuan sebelum ini tidak pernah memutuskan atau satu perkara penting di mana hujah lanjutan dan keputusan Mahkamah Persekutuan akan memanfaatkan secara umum; dan (ii) jika perkara yang diputuskan berpihak kepada perayu yang mempunyai tujuan, terdapat satu kes prima facie bagi menjayakan rayuan terebut (lihat ms 68D–F).

(2) Mahkamah berpandangan bahawa persoalan undang-undang yang disarikan daripada persoalan-persoalan di atas yang memerlukan pertimbangan mahkamah adalah sama ada, dalam satu tindakan fitnah, Mahkamah Tinggi boleh memutuskan atas

pembelaan justifikasi dan perlindungan bersyarat tanpa satu perbicaraan untuk menolak guaman pemohon/plaintif terhadap defendan/responden di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Persoalan ini menimbulkan persoalan prinsip am yang sebelum ini tidak pernah diputuskan oleh Mahkamah Persekutuan (lihat ms 68B–C).

(3) Namun begitu, dua kriteria dalam Datuk Syed Kechik bukan eksklusif. Dalam keadaan-keadaan kes ini, pertimbangan yang paling utama adalah sama ada pemohon mempunyai satu kes prima facie yang boleh berjaya sekiranya kebenaran diberikan tentang persoalan yang dirumuskan di atas. Setelah bersetuju dengan sebab-sebab dan kesimpulan hakim perbicaraan yang bijaksana tentang pembelaan justifikasi dan perlindungan bersyarat setelah menggunakan undang-undang berdasarkan fakta matrix kes, adalah pandangan bersifat kedaerahan mahkamah di mana sekiranya kebenaran untuk membuat rayuan diberikan, pemohon tidak akan mempunyai apa-apa prospek untuk berjaya (lihat ms 69B–C).]

Notes

For cases on leave to appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 668–709.

Cases referred to

Datuk Syed Kechik bin Syed Mohamed v The Board of Trustees of the Sabah Foundation [1999] 1 MLJ 257 (folld)

Lange v Atkinson [1988] 3 NZLR 424 (refd)

Lange v Australian Broadcasting Corp [1997] 189 CLR 520 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 96(a)

Rules of the High Court 1980 O 18 r 19

Appeal from: Civil Appeal No W–02–663–99 (Court of Appeal, Kuala Lumpur)

Karpal Singh (*Ramkarpal Singh* with him) (*Karpal Singh & Co*) for the appellant.

Dato' Mohd Adnan bin Datuk Shuaib (*N Chandran* with him) (*Adnan Sundra & Low*) for the respondent.

Mohamed Dzaiddin Chief Justice. : This is an application for leave to appeal from the decision of the Court of Appeal under s 96(a) of the Courts of Judicature Act 1964 ('CJA'). Mr. Karpal, for the applicant, formulated three questions for our consideration. However, in the course of his submission, he wanted leave to be granted only on two questions, namely:

(1) Whether the Court of Appeal was right in holding that the convictions of Sukma Darmawan and Dr Munawar Anees by the Sessions Court, Kuala Lumpur and the admission of the facts read out in Court by both of them could constitute a defence of justification in respect of the offending words, meriting dismissal of the applicant's suit under O 18 r 19 of the Rules of the High Court 1980 ('RHC'); and

(2) Whether the Court of Appeal was right in relying on the principle in *Lange v Atkinson* 3 NZLR [1988] 424 and concluding that the decision of the learned trial judge on the issues of qualified privilege should not be disturbed having regard to the application to strike out the applicant's suit being one under O 18 r 19 of the RHC.

We are of the view that the question of law as distilled from the above questions for the consideration of the court is whether in a defamation action, the High Court can decide on the defence of justification and qualified privilege without a trial to dismiss the applicant/plaintiff's suit against the defendant/respondent under O 18 r 19 of the RHC.

Section 96(a) CJA provides that an appeal shall lie, from any judgment or order of the Court of Appeal... involving a question of general principle decided for the first time *or* a question of importance upon which further argument and a decision of the Federal Court would be to public advantage. In *Datuk Syed Kechik bin Syed Mohamed v The Board of Trustees of the Sabah Foundation* [1999] 1 MLJ 257 at p 265, this court held that the Federal Court grants leave to appeal from the Court of Appeal sparingly and will not grant such leave unless the following criteria are satisfied by the intending appellant: (i) the judgment of the Court of Appeal has raised a point of general principle which the Federal Court has not previously decided or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage; and (ii) if the point is decided in favour of the intending appellant, there is a prima facie case for success in the appeal. Regarding the second criterion, the court observed (at p 262) that an assessment of the prospects of success should leave be given is, of course, an important factor which the Federal Court would have to take into account. It is however, not necessary for the intending appellant to demonstrate to the court the probability and a reasonable likelihood of the appeal succeeding in the event of leave being granted. All he needs to do is to show that on first impression, the appeal might succeed.

In our view, the question which we formulated above raises a question of general principle not previously decided by the Federal Court. It comes under the first criterion of s 96(a). However, *Datuk Syed Kechik* held that the two criteria of the section are not exclusive. Hence, an assessment of the prospects of success should leave be granted is an important factor which the Federal Court would have to take into account. On this point, we note that Mr. Karpal merely deposed in his supporting affidavit that 'if any or all issues raised are decided in the applicant's favour, there is a prima facie case for success in the appeal.' There was no submission made on this point to demonstrate that there is a prima facie case for success in the appeal.

After reading the grounds of judgment of the trial judge (see [1999] 4 MLJ 58), we find he has correctly addressed the issues of justification and

qualified privilege raised by the respondent in his defence. We hasten to add that he relied on the facts admitted and the confession as to the acts of gross indecency in the criminal cases involving Munawar and Sukma to found his finding that the words spoken of by the respondent constitute justification. On qualified privilege, we also find the learned trial judge had applied the correct test and law to the facts and circumstances of the case. In fact, the correct authority on qualified privilege in the context of the respondent's defence is *Lange v Australian Broadcasting Corp* [1997] 189 CLR 520 and not *Lange v Atkinson*.

Therefore, in the circumstances of the case, the paramount consideration is whether the applicant would have a prima facie case for success should leave be granted on the question which we formulated above. Having agreed with the reasons and the conclusion of the learned trial judge on the defence of justification and qualified privilege after applying the law to the factual matrix of the case, it is our provisional view that should leave to appeal be granted, the applicant would not have any prospect of success.

It is not the practice of the Federal Court, following the English House of Lords, to give explicit reasons for granting or refusing leave (*Datuk Syed Kechik* at p 260). However, in the present application, we think it is desirable that we should state our reasons for refusing leave although there is a point of law of general principle not previously considered and decided by the Federal Court.

Therefore, for reasons stated, we dismiss this application with costs. Deposit to be paid to the respondent to account of taxed costs.

Application dismissed with costs.

Reported by Wong Ee Lynn